



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL APPEAL NO 60 OF 2017**

**BETWEEN**

**A O. O.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**[Appeal from original conviction and sentence of Hon. Bernard Kasavuli - SRM from Winam SRM'S Criminal Case No. 235 of 2016].**

## JUDGMENT

1. The appellant, **A O O** , was convicted for the offence of defilement contrary to **Section 8(1) (4) of the Sexual Offences Act**. He was then sentenced to serve Life Imprisonment.
  
2. In his Memorandum of Appeal he faulted the trial court for failing to appreciate that it was highly unlikely that the complainant had been left alone at home, at night.
  
3. Secondly, he contended that the possibility of any positive identification was minimal in the circumstances prevailing at the time of the alleged defilement. The offence was said to have been committed at night.
  
4. Thirdly, the appellant pointed out that there had been no corroboration. In his view, corroboration could have been by way of an examination of his person and the clothing of the complainant.
  
5. The fourth ground of appeal was that the evidence tendered by the prosecution had numerous inconsistencies, thus rendering the evidence unreliable.
  
6. The fifth ground in the Memorandum of Appeal was that the trial court had erred by shifting the burden of proof to the appellant.
  
7. The appellant also complained that the sentence was manifestly excessive, in view of the circumstances.
  
8. When canvassing the appeal, Mr. Anyul advocate informed the court that although the appellant had originally expressed a desire to make an application to have further evidence adduced, he had decided not to pursue that route.

9. The appellant's contention was that the identification which was based on the following three things, was insufficient;

a. The "Rasta" hairstyle;

b. He was a neighbor; and

c. The lighting in the house was sufficient.

10. He attacked the finding on the issue of identification by pointing out that the hole which was made in the wall of the house where the victim was sleeping was near the floor, and that the complainant confirmed that she did not see the appellant entering the room.

11. The photographs which were produced in evidence showed a mud-walled house, which did not have windows.

12. The house did not have a lighting system save for a tin lamp which would only be put on whenever it was needed. Therefore, when the tin lamp was not on, the house would be in darkness.

13. On the issue of the hairstyle, the appellant pointed out that it was not unique to him.

14. And as regards the blood and urine samples which were obtained from the bed on which the offence was committed, the appellant pointed out that the results of the analysis were not presented to the trial court.

15. As samples were taken from him, the appellant submitted that the results from the Government Chemist were crucial, because they could have either linked him to the offence or could have exonerated him.

16. In answer to the appellant's submissions, Miss Barassa, learned state counsel, submitted that the identification had been positive. She also pointed out that the appellant, who was a neighbor to the complainant, used to regularly visit the complainant's home.

17. As regards the hairstyle donned by the appellant, the respondent said that the same was unique.

18. And on the issue of lighting, the respondent said that there was moonlight and security lights, which brought light into the house.

19. In a brief rejoinder to the respondent's submissions, the appellant said that there were no security lights in the photographs produced in court.

20. Being the first appellate court, I have an obligation to re-evaluate all the evidence on record, and draw my own conclusions.

21. PW1 was the complainant. She testified that on the material night, she was asleep at their house. Her mother had gone to attend a funeral.

22. PW1 said that "Baba Michael" entered the house through a hole which he dug in the wall. He then "did bad manners" to the complainant.

23. PW1 gave an explicit description of the offender's actions, which included the insertion of his hand into her vagina and her anus, as well as the insertion of his penis into her vagina.

24. When she was asked how she identified the person who had molested her, PW1 said;

**“I knew it was baba Michael because he had a rasta hair. I also saw his face. I was able to see him because of our neighbor’s security light and also God’s electricity (moon).”**

25. During cross-examination, the complainant rejected the suggestion that she could not have been able to tell the person who had come into the house. She reiterated that she saw the said person.

26. The complainant admitted that the rasta hairstyle was not unique to the appellant. She named O R and Y, as persons with rasta hair, within the area where the complainant lived.

27. She also said that O had big rasta.

28. In the circumstances, it is clear that although the rasta hairstyle was not unique to the appellant, the complainant was able to distinguish between the persons with rasta hairstyle. Accordingly, it is not just because the appellant had rasta hairstyle that he was identified.

29. Furthermore, the complainant specifically testified that she had seen the face of the appellant.

30. On the issue of lighting, the complainant confirmed that inside the house where she was defiled, there was no light. However, she made it clear that she saw the accused;

**“.....with use of moonlight and security light which passed through the hole he had dug.”**

31. PW2 is the complainant’s mother. She testified that she left her house at about 10 pm, to go to a funeral.

32. She also said that she returned home at about midnight.

33. Whilst the appellant suggested that it was improbable that a child as young as the complainant could be left alone in the house at night, I find no reason to cast any doubt on the evidence of PW2.

34. PW2 also testified that after her daughter had told her that it is the appellant who had defiled her, PW2 escorted the police to the appellant's house, where the police arrested him.

35. At the time of arrest, the complainant was present and she told the police that it is the appellant who had defiled her.

36. Both PW1 and PW2 testified that their house had wide windows.

37. It is therefore understandable that;

**“...when there is security light outside, it penetrates my house because I have light curtains.”**

38. PW2 added that when she got back home from the funeral, there was both moonlight and security lights.

39. I note that during cross-examination, the appellant did not raise any question about the presence or otherwise of the security light or of the moonlight. Therefore, to now suggest, during the appeal, that there was no security light is an afterthought cannot be permitted to derail evidence that was unchallenged during the trial.

40. **PW3, PC JAIRUS AGWA**, testified that it is the complainant's mother who led the police to the Appellant's house, where they arrested him.
41. According to **PW3**, the Appellant told the police that he was **HIV** positive and that he would be healed by having sex with a minor.
42. Although the witness reiterated, during cross-examination, that the Appellant had confessed to having defiled the minor, and that if he did so because it would bring him healing, it is noteworthy that the alleged confession was not mentioned in the written statement recorded by the witness.
43. In any event, as the alleged confession was made in circumstances that do not comply with the regulations which would render confessions admissible in evidence, I find that the alleged confession, even if it had been made, would have been inadmissible.
44. The provisions of *Section 25, 25A, 26, 27 and 29 of the Evidence Act* provide the requirements which must be met before a confession can become admissible in evidence.
45. **PW4, PHILLIP K. LIMO**, is a Clinical Officer who was based at the Kisumu County Hospital. He produced the P3 Form which had been filled by his colleague, **DR. L.A. WATANGA**. At the time the Appellant was standing trial, Dr. Watanga was away in Tanzania, where, he had gone for a 3 years' study programme.
46. The hymen of the complainant was freshly broken and there were lacerations on her vaginal wall.
47. Clearly, as the medical practitioner stated, the Complainant had been defiled.
48. **PW5, PC CHRISPINUS ABULA**, was a police officer attached to the Crime Scenes Support Services, Kisumu.

49. He produced the photographs which he had taken at the scene. At the time when the photos were taken, the mother of the Complainant was not at home.

50. **PW5** took photos which, inter alia, showed the inside of the house. He was able to do as the window was open.

51. The evidence of **PW5** corroborated that of the Complainant's mother, concerning the presence of a window through which a person could see the insides of the bedroom.

52. Photograph No. 2 actually shows a relatively large window which was on the wall adjacent to the wall on which a hole was dug. I am therefore satisfied that if there was moonlight and security lighting outside the house, it was possible for somebody who was inside the house to see another person properly, even if no other light was on inside the house. I so find because even though **PW5** took photos from outside the house, there was sufficient lighting to enable us see the details of what was inside the house.

53. I appreciate that the lighting during daytime may be brighter than that from the moonlight at night, but as the Complainant was able to even see the colour of the vest worn by the Appellant, the lighting must have been sufficient for positive identification.

54. When the Appellant was put on his defence, he denied committing the offence. He said that he was at home all through the night when the offence was committed.

55. He attributed the case against him to the fact that the Complainant's mother had framed him, after he had reprimanded her for leaving the Complainant at the Appellant's house until 11p.m on one night.

56. The Appellant's wife corroborated the evidence of her husband concerning the incident when the Complainant remained at the Appellant's house until 11p.m.

57. However, the wife of the Appellant denied the assertion that the incident happened about 2 weeks prior to the date when the Complainant was defiled.

58. Whilst the Appellant had said that the incident took place 2 weeks prior to the defilement, his wife said that the incident took place 2 months before.

59. To my mind that inconsistency is significant, as it indicates that the defence was not corroborated. It would mean that the Complainant's mother had no reason to frame the Appellant.

60. But it is also significant to note that the Appellant and his wife, both confirmed that they were neighbours of the Complainant.

61. In effect, when the Complainant identified the Appellant, this was a case of recognition.

62. The Appellant also confirmed that on the day of his arrest he was wearing a red vest. The said vest was the same one that the Complainant had seen the Appellant wearing at the time he defiled her.

63. Having re-evaluated the evidence adduced, including the defence, I find that the prosecution proved the case against the Appellant beyond any reasonable doubt.

64. In the event, there is no merit in the appeal. Accordingly, the appeal is dismissed, and I uphold both the conviction and the sentence.

**DATED, SIGNED and DELIVERED at KISUMU, this 29<sup>th</sup> day of June 2018.**

**FRED A. OCHIENG'**

**JUDGE**